

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES C. HENRY)	
Claimant)	
VS.)	
)	Docket No. 1,048,734
MID KANSAS SEAMLESS)	
Respondent)	
AND)	
)	
TRAVELERS INDEMNITY COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) appealed the June 3, 2010, Order entered by Administrative Law Judge (ALJ) John D. Clark.

E. L. Lee Kinch of Wichita, Kansas, was appointed to serve as a pro tem in this matter in place of former Board Member Carol Foreman.

ISSUES

In the June 3, 2010, Order, the ALJ named Dr. John Fan as claimant's authorized treating physician. Moreover, the ALJ assessed penalties against respondent for the period from May 3 to May 28, 2010, at the rate of \$100 per week for failing to pay compensation. That Order reads:

Dr. John Fan is the authorized treating physician who has the Claimant restricted from work. The Respondent has agreed to begin temporary total disability payments beginning May 28, 2010. The Court's previous Order is dated May 3, 2010.

Penalties are assessed against the Respondent at a rate of \$100 per week from May 3, 2010, until May 28, 2010.¹

Respondent contends claimant was not entitled to receive compensation for that period as the Judge's order of May 3, 2010, provided that claimant's temporary total disability benefits ceased upon his being released to return to work. Accordingly, respondent argues claimant's temporary total disability benefits automatically stopped on March 17, 2010, when claimant's then-treating physician, Dr. Matthew Henry, released claimant from all restrictions. Further, respondent notes that Dr. Henry referred claimant to Dr. Fan, who did not restrict claimant in any manner until their third visit that was on May 28, 2010. In short, respondent maintains it should not be penalized for failing to pay compensation as claimant did not have any medical restrictions on him during the period in question and, therefore, he was not entitled to receive any temporary total disability compensation during that period.

At the penalty hearing on June 3, 2010, claimant argued to the ALJ that he had not been released as Dr. Fan had provided a work status report dated May 28, 2010, which indicated claimant was unable to work. Claimant also argued that Dr. Henry merely released claimant from medical care when the doctor referred claimant to Dr. Fan, and, in essence, implied that he continued to have restrictions. Although claimant did not file a brief with the Board, it is reasonable to assume that claimant would request the Board to affirm the June 3, 2010, Order.

The only issue before the Board on this appeal is whether respondent owes penalties for failing to pay claimant compensation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

This is a request for penalties under K.S.A. 44-512a for failing to pay compensation. Claimant was injured on December 14, 2009, when he fell from a ladder while installing guttering. As a result of the accident claimant fractured his skull and developed a large left frontal temporal epidural hematoma, which required an emergency craniotomy. Following a preliminary hearing the ALJ ordered respondent to pay claimant temporary total disability benefits. Claimant's present request for penalties is premised upon that May 3, 2010, Order.

¹ ALJ Order (June 3, 2010).

The following time line summarizes the procedural history that is pertinent to this appeal.

1. The parties appeared before the ALJ on February 16, 2010, at a preliminary hearing in which claimant requested medical benefits and temporary total disability benefits. Following the preliminary hearing the parties took seven depositions and on April 29, 2010, appeared before the ALJ a second time. At that hearing the parties announced the claim was ripe for a preliminary hearing order. Dr. Matthew Henry's medical notes from March 2010, which released claimant from all restrictions, were not a part of the evidentiary record at that point in time.
2. On May 3, 2010, the ALJ entered a preliminary hearing Order in which he ordered respondent to pay claimant temporary total disability benefits "beginning December 15, 2009, until the Claimant is released." The ALJ also designated Dr. Matthew Henry as claimant's authorized treating physician.
3. Claimant immediately demanded the payment of the compensation ordered by the ALJ with the Demand for Compensation being received by the Division of Workers Compensation (Division) on May 4, 2010.
4. On May 10, 2010, the Division received respondent's request for Board review of the May 3, 2010, preliminary hearing Order.
5. On June 3, 2010, the parties appeared before the ALJ for a hearing to address claimant's request for penalties. Respondent presented Dr. Henry's medical records that indicated he released claimant from all restrictions as of March 17, 2010.
6. On June 3, 2010, the ALJ assessed penalties "against the Respondent at a rate of \$100 per week from May 3, 2010, until May 28, 2010."² The ALJ also named Dr. John Fan as the authorized treating doctor. At that hearing claimant presented a work status report from Dr. Fan that indicated claimant was unable to work.

² ALJ Order (June 3, 2010).

7. On July 30, 2010, a Board Member issued an order in the appeal of the May 3, 2010, preliminary hearing Order. The Board Member affirmed the preliminary hearing Order.

The record does not disclose what weeks of temporary total disability compensation have been paid but respondent relies on the explicit language of the May 3, 2010, Order and maintains it did not owe claimant any temporary total disability compensation during the period in question as Dr. Henry released claimant from all restrictions on March 17, 2010. Dr. Henry's March 17, 2010, letter to Dr. Geri Hart stated claimant was essentially asymptomatic and that Dr. Henry was going to release him. In addition, Dr. Henry seemed to indicate claimant should be referred to a physical medicine and rehabilitation specialist for final disposition. The letter to Dr. Hart read in part:

. . . As you know, Mr. Henry is a very pleasant gentleman with a history of left frontotemporoparietal craniotomy for evacuation of epidural hematoma on December 14, 2009. He is doing quite well. He essentially is asymptomatic, although he still has occasional headaches.

Followup CT scan looks great.

At this point in time, I am going to release him from all restrictions and asked to be referred to physical medicine and rehabilitation doctor for final disposition.³

Also on March 17, 2010, Dr. John G. Fan saw claimant for chronic headaches. Respondent introduced the doctor's notes from that visit, along with notes from the doctor's visit with claimant on April 14, 2010. Neither of the medical notes from those two visits address whether claimant should be working or whether claimant should restrict his activities in any manner. Claimant, however, introduced a Work Status report from Dr. Fan dated May 28, 2010, in which the doctor indicated that claimant was unable to work and should follow certain restrictions.

The issue on this appeal is whether respondent failed to comply with the ALJ's May 3, 2010, order granting claimant temporary total disability benefits. K.S.A. 44-512a provides that penalties may be assessed when compensation is not paid that has been awarded. And that penalty may not exceed \$100 per week for each week the disability compensation is past due. K.S.A. 44-512a(a) reads:

In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty,

³ M.H. Trans., Resp. Ex. 1.

to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

The June 3, 2010, Order implies that respondent failed to pay claimant compensation for the period from May 3 to May 28, 2010. Accordingly, the question in this appeal is not whether claimant was temporarily and totally disabled during that period but, instead, whether compensation was awarded for that period under the terms of the May 3, 2010, Order.

The express terms of the May 3, 2010, Order stated respondent was to pay claimant temporary total disability benefits "beginning December 15, 2009, until the Claimant is released."⁴ The Board finds the evidence establishes that Dr. Henry, who was the authorized physician, released claimant from all restrictions in March 2010. The Board also finds claimant was not restricted again until May 28, 2010, when Dr. Fan issued his Work Status report. Accordingly, under the explicit terms of the May 3, 2010, Order no temporary total disability compensation was due for the period of May 3 to May 28, 2010. Consequently, the order for penalties should be reversed.

The Board notes that the above findings and conclusions merely address whether compensation was due under the terms of the May 3, 2010, Order for the period in question. In other words, this order does not address whether claimant met the definition of being temporarily and totally disabled during that time, which is an entirely different issue.

WHEREFORE, the Board reverses the June 3, 2010, Order and denies claimant's request for penalties.

IT IS SO ORDERED.

⁴ ALJ Order (May 3, 2010).

Dated this ____ day of November, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Sylvia B. Penner, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge